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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CESAR MOYA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Encounter between petitioner and agents of the Drug Enforcement Administration at the airport was a seizure of petitioner under the Fourth Amendment.

Whether the Petitioner's constitutional rights under the Fourth Amendment against unreasonable search and seizure were violated when a shoulder bag he was carrying was seized from his possession, at the airport by agents from the Drug Enforcement Administration and Chicago Police Department.

Whether the decision of the U.S. Court of Appeals for the 7th Circuit affirming the ruling of the U.S. District Court for Northern District of Illinois denying petitioner's motion to suppress evidence conflicts with controlling rulings of the United States Supreme Court.

PARTIES

All parties are named in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CESAR MOYA,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cesar Moya, Petitioner, respectfully asks that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Seventh Circuit in United States of America, Plaintiff-Appellee v. Cesar Moya, Defendant-Appellant, No. 81-2225, which affirmed his conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. 841 (a) (1) and upheld the ruling of the United States District Court for the Northern District of Illinois denying petitioner's Motion to Suppress Evidence.

REPORTED DECISIONS

The opinion of the United States Court of Appeals for the Seventh Circuit, United States of America v. Cesar Moya is not yet reported. A copy of the opinion appears as an appendix to this petition. A copy of the order of the United States Court of Appeals for the Seventh Circuit

denying petition for re-hearing and suggestion for re-hearing in banc appears in the appendix to this petition. The Memorandum opinion and order of the United States District Court for the Northern District of Illinois is not reported. A copy of that opinion appears in the appendix to this petition.

JURISDICTION

1. On May 1, 1981, Petitioner was found guilty of violating Title 21 United States Codes Section 841 (a) (1) by a United States District Court for the Northern District of Illinois. The United States Court of Appeals for the 7th Circuit affirmed petitioner's conviction by decision filed March 22, 1983. Petitioner filed a Motion for an extension for filing a Petition for re-hearing and to stay the Court's Mandate on April 5, 1983. The United States Court of Appeals for 7th Circuit granted said Motion on April 13, extending the date for filing defendant's appellant petition for rehearing to April 20, 1983. The petitioner filed a Petition for Rehearing on April 20, 1983. The United States Court of Appeals for the Seventh Circuit in United States of America denied the petition for rehearing by order Dated June 16, 1983. No extension of time within which to petition for certiorari has been sought or allowed.

2. Jurisdiction lies to this court under Title 28 United States Code § 1254 (1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States
Amendment IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On June 6, 1980, a federal grand jury sitting in the Northern District of Illinois, Eastern Division, returned a one count Indictment charging the Defendant, singularly, with possessing with intent to distribute approximately five hundred and one grams of a cocaine mixture in violation of Title 21, United States Code, Sec. 841 (a) (1). The defendant filed a Motion to Suppress, alleging that the Government obtained custody of this cocaine through an unlawful seach and seizure. The Defendant waived jury trial and on December 1, 1980, underwent a consolidated non-jury trial and suppression hearing before the Honorable Bernard M. Decker. In a "Memorandum Opinion and Order" dated May 7, 1981, Judge Decker denied the Defendant's Motion to suppress and found the Defendant guilty of having violated the provisions of 21 U.S.C. 841 (a) (1) as charged in the Indictment. On July 14, 1981, the trial court imposed a two year prison sentence on the Defendant, to be followed by a special parole term of four years.

On March 20, 1980, Cesar Moya arrived at Chicago's O'Hare International Airport from Miami, Florida on Delta Airlines Flight 142. Cesar Moya proceeded to walk through the airport concourse to the escalators that lead down to the baggage claim area carrying a shoulder bag. Upon reaching the arrival area of the terminal, Cesar Moya proceeded to exit the terminal and entered a line of people waiting for cabs.

As he was standing in the cab line, Moya was approached by Kenneth Labik, a Drug Enforcement Administration Agent and Thomas Kinsella, a Chicago Police Officer, who identified themselves as law enforcement officers and asked to speak with Moya. The officers asked Moya for identification and testified that Moya denied having any identification.

At the officers request, Moya accompanied them back into the terminal area between the inner set and outer set of exit doors where the questioning continued. Moya was asked his name and was asked to display his airline ticket, which he did. The ticket was a one way ticket in the name of Cesar Moya. Moya was asked for further identification by Agent Labik, to which Moya responded by asking what their questioning was all about. Agent Labik ignored Moya's inquiry and demanded some other identification. According to Agent Labik's testimony, Moya then reached into the side pocket of the shoulder bag he was carrying and produced a driver's license in the name of Cesar Moya with his picture on it.

As Moya reached into the shoulder bag for the driver's license, Agent Labik testified that he glimpsed a corner of a clear plastic bag. Agent Labik asked Moya to remove the plastic bag. Moya denied having a plastic bag, at which point Labik told Moya to remove the plastic bag or he (Labik) would do it himself. Moya then removed the plastic bag from the shoulder bag. The bag contained several other clear bags, some small bottles and some small spoons.

Agent Labik and officer Kinsella then asked Moya's permission to search his shoulder bag. When Moya declined to grant permission to search his shoulder bag, the bag was taken from him by the officers who told Moya they would detain the bag and try to get a warrant to search the bag. Another agent, Agent Anderson, arrived with a camera to take Moya's picture. After his picture was taken, Moya departed the airport without his shoulder bag. The agents testified the encounter took 15 minutes, Moya testified the encounter took 40 minutes.

Approximately 3 hours after the seizure, Moya's bag was picked out of a lineup of six similar bags by a United States Custom Service dog trained to detect the existence of narcotics by smell. Based on this information a warrant to search Moya's bag was obtained from a Cook County

Circuit Court Judge and 501.77 grams of a cocaine mixture were discovered.

At the combined bench trial and evidentiary hearing on his motion to suppress evidence, Moya testified that he showed his plane ticket and identification to the officers upon their request and then his request to leave was denied. Moya stated he was then frisked and submitted to having his picture taken only after the officers threatened to keep his driver's license if he did not.

In his memorandum, Judge Decker of the U.S. District Court for Northern District of Illinois stated that at the time Labik and Kinsella approached Moya in the cab line the reasons for suspecting him were no more substantial than the reasons rejected by the U.S. Supreme Court in *Reid* v. *Georgia*, 448 U.S. 438 (1980) and "that Moya's questioning would be constitutionally insupportable if that questioning rose to the level of a 4th Amendment "seizure" ". But Judge Decker found Agent Labik's account of the encounter more credible than Moya's and rendered the opinion that "Moya would have been free to walk away from Labik and Kinsella at any time, that a reasonable man in his position would have realized this and therefore his participation in the questioning was entirely voluntary".

Judge Decker found that although Moya's production of the plastic bag was an involuntary act that amounted to an unconstitutional warrantless seizure, the officers "had previously accumulated in a lawful manner sufficient knowledge to justify the bags detention," without the taint of the illegally seized evidence.

The United States Court of Appeals for the 7th Circuit rejected Moya's contention that his encounter with Agent Labik and Officer Kinsella amounted to a seizure and that the seizure of his shoulder bag was a violation of his Fourth Amendment rights in affirming his conviction.

ARGUMENT AND REASONS FOR ALLOWING THE WRIT OF CERTIORARI

This case presents the Court with a myriad of issues that surround Airport investigatory stops of citizens and detention of their baggage based upon the "Drug Courier Profile".

1. Whether there were articulable facts to give rise to reasonable suspicion, petitioner possessed contraband to make an investigatory stop reasonable.

2. Whether the investigatory stop constituted a seizure of petitioner under the 4th Amendment.

3. Whether the seizure and subsequent detention of petitioner's shoulder bag was proper under the 4th Amendment.

4. Whether the Court of Appeals ruled properly within the guidelines established by the U.S. Supreme Court in a line of recent decisions it has handed down on this specific topic.

In *Reid* v. *Georgia*, 448 U.S. 438, 440., 65 L.Ed. 890, 893 (1980), this court held that citizens may be detained briefly, without probable cause but such a detention by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. The factors considered must distinguish the detained person from other travelers.

In *Terry* v. *Ohio*, 392 U.S. 1, 16, 20 L. Ed 2d 889 (1968), this court held "that not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that seizure has occurred."

Judge Decker in his Memorandum Opinion in the instant cause found that the facts in *Reid* mirror the facts in this case.

"The reasons given by Labik and Kinsella for suspecting Moya prior to the time they approached him at the cab line were no more substantial than the reasons rejected by the Court in *Reid* . . . it would not be difficult to imagine perfectly innocent explanations for every one of Moya's actions . . . there is every reason to believe that Moya's questioning would be constitutionally insupportable if that questioning rose to the level of "Fourth Amendment "seizure"." •

However the district court ruled that the encounter between Moya and Agent Labik and officer Kinsella did not amount to a seizure that triggered the Fourth Amendment's protections and the Appellate Court affirmed the district court's ruling. The petitioner disagrees.

In *U.S.* v. *Mendenhall*, 446 U.S. 544 (1980), this court held "that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave".

The district court applied the reasonable person test and determined that a reasonable person in Moya's position

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• In *People* v. *DeLisle*, 104 Ill. App. 3d 297, 300 (1982) 1st District. The Illinois Appellate Court for the 1st District found the airport stop in that case to be "arbitrary and oppressive interference" with the defendant's right to privacy.

In *People* v. *Kiser*, 113 Ill. App. 3d 501, 503 (1983) 1st District, the Illinois Appellate Court noted specifically that it was the same officer [officer Kinsella], who made the arbitrary investigative stop in DeLisle was also present in this case and gave similar testimony in both cases as to the defendant's behavior.

In both cases, the Illinois Appellate Court found the actions of the law enforcement officials improper and that the evidence seized should be suppressed.

would have realized that he was free to walk away from Labik and Kinsella at any time. The appellate court adopted the same test and found no error in the district court's ruling.

As Judge Swygert states in his dissent, "it is clear that Moya was seized at some point during the encounter. . . . Acquiescence does not amount to consent . . . a reasonable person faced with continued police questioning would not feel free to walk away". In *Florida* v. *Royer*, U.S. 103 S. Ct. 1319 (1983), Justice White observed that a citizen's consent to be an effective waiver of his Fourth Amendment rights must be freely and voluntarily given demonstrating more than a mere submission to lawful authority citing among others *Lo-Ji Sales, Inc.* v. *New York*, 422 U.S. 319, 329 (1979); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223-234 (1973).

In the instant cause, Moya was standing outside the airport terminal in a cab line when approached by Labik and Kinsella and was escorted back into the terminal where he was questioned by the two officers. After showing the officers his ticket in his name it is undisputed that the officers asked for more indentification and Moya responded by asking "what this was all about". The agents ignored the inquiry. Moya testified that at about this point he asked to leave but was not allowed. Labik denied this. Moya testified he was frisked and then asked to remove his boots which he refused to do. The court agreed that Moya was then unconstitutionally compelled to produce a plastic bag from his shoulder bag by Agent Labik. Moya testified that he was forced to have his picture taken by an agent or his driver's license would be seized. The District Court gave the full weight of credibility to Agent Labik over Moya because Labik is a trained observer while Moya is just a regular citizen of Cuban descent who speaks broken English.

It is incomprehensible as to how, in the instant cause, the District Court and Appellate Court could come to the conclusion based on these facts that any reasonable person would realize they were to leave at any time. Logic dictates that a reasonable person confronted with this type of Police Action would submit to lawful authority. There is no testimony that either officer told Moya he was free to go or that he did not have to talk to them. At the point of the initial encounter in the cab line, any reasonable person in Moya's position would have opted to get in a cab rather than return to the airport terminal for questioning by narcotics officers if he believed he was free to go at that point. When Agent Labik demanded Moya to produce the plastic bag or he (Labik) would, no reasonable person could believe they were free to go. After his shoulder bag was seized, Moya was not free to go until his picture was taken by agents.

In *United States* v. *Gatlin*, 325 F. 2d. 666 (1963) the court held that the detention of an accused without booking him or taking him before a magistrate and the questioning of him until (evidence) is obtained demonstrates that the arrest was an illegal arrest for investigation. In the instant cause the District Court found and the Appellate Court upheld erroneously that during the encounter with Moya, before the illegal production of the plastic bag, there arose sufficient articulable facts to support a reasonable suspicion that Moya's shoulder bag contained narcotics.

In *United States* v. *Place*, 51 L.W. U.S. 4845 (1983), this court held that detention of baggage was permissible if based upon an articulable reasonable suspicion and if said detention was reasonable in it's scope, limiting the intrusion to a proper balance of public policy interests and citizens privacy interests.

In *Place*, this court held that the detention of luggage for a hour and a half was unreasonable, and that there must

be some reasonable efforts on the part of the seizing agents to provide for the return of seized articles immediately if no probable cause is established.

IF IN the instant cause and solely for the purpose of this argument, there did exist an articulable reasonable suspicion that Moya's bag contained narcotics, than its detention was beyond the scope established as reasonable by the court in *Place*. Moya's bag was held for 3 hours before a "sniff test" by a trained dog was performed. At the time of seizure, Labik and Kinsella made no provisions for Moya to reclaim his baggage at any time. In fact, they took his picture so that in the event contraband was discovered they could locate Moya to apprehend him.

The Memorandum opinion of the United States District Court for the Northern District of Illinois and the decision of the United States Court of Appeals for the Seventh Circuit conflict with the controlling rulings of this court. The District court, cited *Georgia* v. *Reid*, supra, held there were no facts upon which the agents could articulate a reasonable suspicion to make the initial investigatory stop of Moya in the instant cause. The appellate court proceeded to erroneously apply the "reasonable person" test in *Mendenhall*, without the benefit of *Florida* v. *Royer*, supra, which was decided that the day after Moya, holding that the encounter between Moya and the agents was consensual and did not amount to a seisure of Moya. The court's ruling that, although Moya's Fourth Amendment rights were violated when he was compelled to produce a plastic bag from his shoulder bag, the subsequent seizure of the shoulder bag was permissible and not tainted by this illegality, is in conflict with the "fruit of the poisonous tree" doctrine of *Wong Sun* v. *United States*, 371 U.S. 471, 9L. Ed. 2d 441 (1963) and it progeny. And finally the Appellate Court did not have the benefit of the ruling in *United States* v. *Place*,

supra, which when applied to the instant cause finds that the seizure and detention of Moya's bag to be unreasonable in it's scope and duration. Accordingly the ruling of the United States Court of Appeal for Seventh Circuit should be reviewed and revised.

CONCLUSION

Wherefore, Petitioner Cesar Moya respectfully asks that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment in United States of America v. Cesar Moya, No. 81-2225, and that upon review by this Court that the denial of Petitioner's motion to suppress be reversed and sustained and the finding of Guilty be reversed.

Respectfully submitted, Cesar Moya, Petitioner.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2225

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CESAR MOYA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 CR 341—**Bernard M. Decker**, *District Judge.*

SUBMITTED NOVEMBER 10, 1982*—DECIDED MARCH 22, 1983

Before CUDAHY and COFFEY, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Cesar Moya appeals his conviction in the United States District Court for the Northern District of Illinois, Eastern Division, for possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Moya contends that the trial court erred in denying his motion to suppress the cocaine the law enforcement officers discovered during

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* Prior to the scheduled oral argument in this case, the appellant filed a motion to waive the argument. The court subsequently granted the appellant's motion and this appeal was submitted on the briefs and record.

a search of his travel bag. His claim is based upon an airport encounter and subsequent detention of his shoulder bag. Moya contends the seizure was unreasonable and violated his Fourth Amendment rights. We hold that Moya's contentions are without merit and affirm the conviction.

On March 20, 1980, Drug Enforcement Administration ("DEA") Agent Kenneth Labik and Chicago Police Officer Thomas Kinsella were stationed at O'Hare International Airport monitoring the arrival of airline passengers on flights from certain "source cities" in an effort to control the flow of illegal drugs. Because the DEA had informed Labik and Kinsella that Miami, Florida was a source city for much of the illegal drug traffic into Chicago, the law enforcement officers observed the passengers deplaning from Delta Airlines Flight 142 upon its arrival from Miami at 7:35 p.m. The officers observed Cesar Moya, carrying a shoulder bag, exit the arrival gate and walk several feet in a direction away from the main terminal, whereupon Moya stopped and positioned himself against the wall momentarily, looking in all directions. Moya then walked down the concourse toward the main terminal, frequently looking backwards over his shoulder. During this time, Agent Labik and Officer Kinsella kept Moya under observation while they followed him. Upon reaching the junction of two concourses, Moya stood off to one side and, again, looked in all directions. Moya then walked into an adjoining hallway and entered a public restroom, followed by Officer Kinsella. Moya checked all of the enclosed stalls and, discovering that they were all occupied, exited the restroom and proceeded to the main terminal building, where he entered another public restroom, this time followed by Agent Labik. When he found an open stall, he entered it, closed the door, stood there for several minutes and left without using the facilities. Upon exiting the restroom, Agent Labik next observed Moya standing between the main doors of the terminal building and the escalator opposite the Delta Airlines ticket counter. As soon as the two made eye contact, Moya boarded a down-escalator followed by

Labik and Kinsella. Upon reaching the arrival area of the terminal, Moya did not go to the baggage area, but exited the terminal and entered a cab line carrying the shoulder bag, his sole piece of luggage.

As he was standing in the cab line, Moya was approached by Labik and Kinsella, who promptly identified themselves as law enforcement officers and asked Moya if they could speak with him. Moya agreed and the officers proceeded to ask Moya for some identification. Moya denied having any identification, but agreed to move back inside the terminal building in order to avoid the night chill and the pedestrian traffic while talking to the officers. The officers and Moya entered the main terminal building and situated themselves in a public area between the primary and secondary sets of exit doors where the questioning resumed.

Moya again was asked his name and replied "Cesar Moya" and was next asked to display his airline ticket. He produced a one-way ticket on Delta Flight 142 in the name of Cesar Moya. After examining the ticket, Labik asked Moya for further identification to which Moya responded by asking what the questioning was "all about." Agent Labik ignored Moya's inquiry and, again, asked for other identification. Moya responded by reaching into a side pocket of his shoulder bag and producing a driver's license in his name (Moya) with his picture thereon. In reaching into the pocket, Moya gave Labik a view of a corner of a clear plastic bag. After making this observation, Agent Labik asked the defendant to remove the plastic bag. Moya replied that he had no plastic bag and Labik told him that if he (Moya) did not remove the plastic bag, he (Labik) would. Moya removed the bag which contained several other clear bags, some small bottles and some small spoons. Moya explained that he used the contents of the bag to carry jewelry. Agent Labik, however, recognized the contents of the bag as drug paraphernalia.

Agent Labik and Officer Kinsella then asked Moya's permission to search the travel bag and advised him that he had a right to refuse. Moya refused and freely

departed the terminal alone while the officers detained the bag in order to attempt to obtain a search warrant. The officers then contacted the U. S. Customs office and requested the services of a dog trained to detect the existence of narcotics by "sniff testing." Approximately three hours later, the trained canine picked out Moya's shoulder bag from among a line up of six similar bags. On the basis of this showing, a search warrant was obtained from a Cook County, Illinois Circuit Court judge. The defendant does not dispute the validity of the warrant. The search of the bag revealed that Moya had 501.77 grams of 35% cocaine in his possession. According to uncontested testimony adduced at the suppression hearing, this is more cocaine than one person would normally have for his personal use and has a street value of between $40,000 and $50,000.

I.

The central issue in this case is whether or not the seizure of Moya's bag was constitutionally permissible. If that seizure was permissible, then, as Moya admits, the ultimate search of the bag was proper and the evidence obtained was admissible. If, however, the seizure was improper, he contends the evidence obtained from searching the bag was "fruit of the poisonous tree" and, as such, should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Consequently, as noted by the district court, the propriety of the seizure turns on two questions:

> (A) Did the questioning of Moya by Agent Labik and Officer Kinsella in a public area of O'Hare International Airport amount to a "seizure" in violation of his Fourth Amendment rights?
>
> (B) If the circumstances of the questioning did not give rise to an unconstitutional seizure, did anything that came to light during the course of the questioning, when taken in conjunction with Moya's previous behavior, justify seizure of his travel bag?

A.

In determining whether a police-citizen encounter violated a defendant's Fourth Amendment rights, the court must first determine whether the encounter was a "seizure" within the meaning of the Fourth Amendment. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (Stewart, J.) (with Rehnquist, J., concurring). Although the Supreme Court has recognized that the Fourth Amendment proscription against unreasonable searches and seizures "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest," *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), the Court also has recognized that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

This circuit has adopted Justice Stewart's "reasonable person" test for determining whether seizures have occurred in airport surveillance cases such as the one before us. *See United States v. Black*, 675 F.2d 129, 134 (7th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3026 (U.S. June 3, 1982) (No. 81-2239). In *Mendenhall*, Justice Stewart, joined by Justice Rehnquist, concluded:

> "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Mendenhall, 446 U.S. at 554. Numerous other circuits have also adopted Justice Stewart's test. *See Black*, 675 F.2d at 134 and cases cited therein. As noted in this court's opinion in *Black*:

> "Imposition of an objective standard requiring the presence of circumstances which indicate that that freedom to disregard has been obumbrated properly provides a reliable basis on which the court may determine whether valuable liberty interests have been infringed, without hamstringing the abil-

> ity of the police to engage in some modicum of legitimate contact with the citizenry."

Id. at 134.

The determination whether an encounter between a defendant and law enforcement officers rises to the level of a seizure under the "reasonable person" test is a highly factual one, dependent on the circumstances of the particular case. "Our standard of review is accordingly limited to inquiry into whether the decision of the district court is clearly erroneous, and requires that particular deference be given to the district judge who had the opportunity to observe the testimony and demeanor of [the witnesses]." *Id.* at 134.

In determining whether a given police-citizen encounter constitutes a seizure in the context of airport surveillance, the courts have looked at a variety of factors. The inquiry has focused on three major areas: (1) The conduct of the police; (2) The person of the individual citizen; and (3) The physical surroundings of the encounter. *Id.* at 134.

In examining the conduct of the police in a particular case, courts have sought to determine whether "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen such as he is not free to walk away." *Id.* at 134. The district court here found that no physical force or show of authority was used to detain Moya. In its opinion, the district court determined:

> "[T]he undisputed testimony shows that Labik and Kinsella did not engage in any show of force in approaching Moya, that they did not lay hands on him at any time, and that Moya showed no hesitancy in agreeing to respond to their questions or agreeing to remove himself from the taxi line and enter the terminal foyer. Moreover, Moya himself characterized the officers' tone of voice and attitude as 'relaxed' throughout the encounter. While Moya did testify that, at one point, he was barred from leaving, Labik directly and expressly contradicted

> this testimony. The court finds Labik's account the more credible. On the whole, Labik gave a more precise, detailed narrative of the relevant events. Moreover, his was an account that was largely corroborated by Kinsella's testimony and by the affidavit filed in support of the search warrant that was ultimately issued in this case. Finally, as a law enforcement officer, Labik is an experienced and trained observer whose memory can be given particular credence. Given all of these circumstances, it is apparent that Moya would have been free to walk away from Labik and Kinsella at any time, that a reasonable man in his position would have realized this, and, therefore, that his participation in the questioning was entirely voluntary. Under these circumstances, no constitutionally cognizable seizure can be said to have taken place."

We hold that the district court's finding on this question of fact is not clearly erroneous and we affirm the court's determination that Moya's freedom was not restrained by an overbearing show of authority. *Id.* at 135.

The characteristics of the individual defendant are another factor for the court to consider in determining whether even a facially innocuous encounter might, under the circumstances, have overborne the citizen's freedom to walk away. Here, there is no evidence suggesting that Moya was "so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment."[1] *Id.* at 135.

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[1] Considering this factor, the district court's opinion recited, in pertinent part:

> "Along the same lines, it is worth noting that Moya did not feel compelled to comply with all of the agents' requests and that they did not insist that he do so. Thus, for example, Moya testified that he was asked to permit the agents to inspect his boots. He refused to do so, and this refusal was honored. Again, the agents asked Moya's permission to search his shoulder bag. He refused to give them permission and no search occurred until a warrant was subsequently obtained."

A final element to be considered under this court's *Black* decision in determining whether a police-citizen encounter was voluntary or coerced is the physical setting in the area where the encounter took place. Here, the initial encounter between Moya and the officers occurred on a public sidewalk with other travelers present. Next, the officers requested him to move into the nearby terminal foyer away from the flow of pedestrian traffic and the night chill and Moya readily acquiesced. This movement of eight-ten feet into the public terminal did not result in Moya's isolation, restraint or any sort of quasi-imprisonment, and was therefore of no legal significance as he was free to walk away from the officers at any time and, in fact, subsequently did walk away. Based on the factors outlined by this court in *Black*, we affirm the district court's conclusion that no seizure occurred during the "personal intercourse" between Moya and the law enforcement officers and a "reasonable person" would have believed that he was free to leave.

B.

Moya's second contention is that the detention of his shoulder bag was an unconstitutional seizure of his personal property. It is clear from a reading of this court's decision in *United States v. Klein*, 626 F.2d 22, 25-26 (7th Cir. 1980), that the law of this circuit is that reasonable suspicion that luggage contains contraband is sufficient to justify temporary detention of the baggage in an airport courier situation. *Accord United States v. Corbitt*, 675 F.2d 626, 629 (4th Cir. 1982); *United States v. Viegas*, 639 F.2d 42, 45 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981); and *United States v. Martell*, 654 F.2d 1356, 1359-61 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. March 15, 1982) (No. 81-1772).[2]

[2] The appellant urges us to follow the Second Circuit's decision in *United States v. Place*, 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982). As this opinion is contrary to

(Footnote continued on following page)

The appellant argues that the facts known by Agent Labik and Officer Kinsella at the time they improperly seized the plastic bag from Moya were insufficient to create a reasonable suspicion in the minds of the officers that the shoulder bag contained contraband.[3] The trial court determined that the officers did not have sufficiently well supported suspicions regarding Moya to support a seizure of the bag at the time they initially approached him in the taxi line prior to any questioning. However, during the subsequent interview, according to the trial court, the following additional facts were adduced justifying detention of the luggage:

> "The first question addressed to Moya at the time he was standing in the cab line was a request for identification. Moya's contention that he had none was, of course, suspicious in itself. The suspicious nature of this response is underlined when a subse-

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[2] *continued*
the established precedent of this circuit and others, we decline to find *Place* controlling. *See Place*, 660 F.2d at 56 n.2 (Kaufman, J., dissenting) and *United States v. Regan*, 687 F.2d 531, 538 (1st Cir. 1982).

[3] The district court determined that the seizure of the plastic bag subsequent to Agent Labik's demand that Moya remove it from his travel bag was illegal. The court further determined that because the officers had an independent basis for detaining the luggage "suppression of this evidence [based on Labik's demand] would not be consonant with the policies that underlie the fruit-of-the-poisonous-tree doctrine and its various limitations." The appellant does not take issue with the district court's application of the exclusionary rule and we, therefore, need not review the court's interpretation. The appellant correctly notes that "the lower court declined to take this factor [possession of narcotics paraphernalia] into consideration" in reviewing the propriety of the seizure of the shoulder bag. Moya argues that "this Honorable Court should conclude that Labik *at no time* had reasonable grounds to seize the Defendant's luggage." Accordingly, we only address the propriety of the detention of Moya's shoulder bag on the basis of the information available to the officers prior to the seizure of the plastic bag.

quent request for identification in the building foyer led Moya to produce his driver's license, thus giving lie to his initial statement. . . . In addition to dissembling about his possession of identification, one additional event during the questioning gave Labik and Kinsella reasonable grounds for suspecting that Moya was engaged in a criminal enterprise. When Moya finally reached into the pocket of his travel bag to produce his license, Labik glimpsed a corner of a clear plastic bag. He promptly asked Moya to remove this bag and show it to him. Moya did not simply refuse to comply with this request, rather he insisted that no plastic bag existed. This was a lie and Labik knew that it was the moment it was uttered. Thus, by the time that Moya initially failed to produce the plastic bag, he had given Labik and Kinsella several grounds for suspecting that his travel bag contained contraband: His behavior in walking from the arrival gate to the taxi stand was sufficient to arouse the officers' inchoate suspicions. After they approached Moya and began to question him, these inchoate suspicions have been sharpened by the disclosure that Moya was hesitant to provide them with information about his identity and by the disclosure that Moya was carrying a plastic bag whose contents he wished to keep a secret. While this information taken as a whole may not have amounted to probable cause to believe that the bag contained contraband, it certainly gave Labik and Kinsella 'reasonable and articuable' grounds for suspecting that this was the case."

The officers were entitled to assess the totality of Moya's conduct in light of their own experience. Among the circumstances that can give rise to reasonable suspicion are the officers' knowledge of the methods used in drug courier activity, characteristics of persons engaged in such illegal practices, the behavior of a suspect who appears to be evading police contact and the suspect's efforts to conceal the truth during a police-citizen encounter. *See Mendenhall*, 446 U.S. at 563 (Powell, J., concurring).

We affirm the district court's determination that the officers had a reasonable suspicion to believe that Moya's travel bag contained contraband even before Moya turned the plastic bag over to them. The officers' curiosity was initially aroused by: (1) Moya's initial movement away from the main terminal after deplaning; (2) Moya removing himself from the flow of pedestrian traffic and surveying the concourse in all directions in a manner consistent with trying to detect surveillance; (3) While Moya walked to the terminal he frequently glanced behind him, as if trying to detect whether he was being followed; (4) Moya entered two public restrooms without utilizing the facilities; (5) Moya, a second time, removed himself from the pedestrian traffic and surveyed the entire surrounding area; and (6) Moya hurriedly exited the main terminal carrying only his shoulder bag. The information recited above by the district court, gleaned during the constitutionally permissible initial encounter, viewed in conjunction with Moya's uneasy, furtive and hesitant movement through the airport provided the officers with a reasonable suspicion to believe that Moya's shoulder bag contained contraband.

Given the lack of effective alternatives available to the officers under the circumstances (allowing Moya to leave with the travel bag or illegally searching it), and the strong likelihood that Moya, now fully alerted, would take immediate steps to dispose of any contraband located in the shoulder bag, the officers' action in detaining the bag for investigation and subsequently obtaining a search warrant was reasonable. *See United States v. West*, 651 F.2d 71, 74 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3132 (U.S. Aug. 14, 1981) (No. 81-307). "We feel that the [officers] proceeded in the best way possible to protect both [Moya's] right to privacy and the government's access to potentially valuable evidence." *United States v. Benjamin*, 637 F.2d 1297, 1302 (7th Cir. 1981).

In accordance with the foregoing reasons, the judgment of the district court is AFFIRMED.

SWYGERT, *Senior Circuit Judge*, dissenting. I respectfully dissent. This appeal raises questions far more complex than those addressed by the majority and forces us to consider issues left unresolved by *United States v. Black*, 675 F.2d 129 (7th Cir.), petition for certiorari filed, 51 U.S.L.W. 3026 (U.S. June 3, 1982). The *Black* court did not decide if a seizure of Black occurred because it found that objective justification sufficient to create reasonable suspicion existed. 675 F.2d at 136, 137. There was, moreover, no question that Black consented to the police-citizen encounter during the period in which the police garnered the objective justification. 675 F.2d at 131-32. Because the agents here did not have a basis for an articulable suspicion and because there is substantial evidence that Moya did not consent to the encounter, the seizure issue cannot be avoided here.

The degree of intrusiveness of stops that do not rise to the level of arrests may vary, and in order to be lawful in a given case it must be proportional to the degree of suspicion that prompted the intrusion. When little or no suspicion exists, therefore, very little intrusion is tolerable. *Brown v. Texas*, 443 U.S. 47, 52 (1979), strongly states this principle of proportionality:

> In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. . . . [E]ven assuming that [a strong social] purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

See also Delaware v. Prouse, 440 U.S. 649, 654 (1979) ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the indi-

vidual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *United States v. Bautista*, 684 F.2d 1286, 1290 (9th Cir. 1982) (prolonged questions must be "related in scope to the justification for their initiation," quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975), quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)); *United States v. Ramirez-Cifuentes*, 682 F.2d 337, 343 (2d Cir. 1982) (court must "carefully measure[ ] the need for the stop against the nature of the intrusion suffered"); *United States v. Nembhard*, 676 F.2d 193, 202 (6th Cir. 1982) (reasonableness of a stop is dependent on balance of public interest and private right to be free from arbitrary interference); *United States v. Streifel*, 665 F.2d 414, 422 (2d Cir. 1981) ("[A]n officer having a reasonable suspicion, based on articulable, objective facts, that criminal activity is afoot may make an investigatory stop that is reasonable both in its duration and its intrusiveness . . . . In balancing the government's law enforcement interests, it is generally true that the more intrusive the stop, the stronger the justification must be . . . and that 'if probable cause is lacking, the intrusion must be no greater than the circumstances require,'" quoting *United States v. Vasquez*, 638 F.2d 507, 520 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981), 454 U.S. 847 (1981)); *United States v. Viegas*, 639 F.2d at 45 ("The facts before the agents . . . adequately justified the initial inquiry. . . . The slight intrusion of this encounter was supported by the [defendants'] evasive actions in the airport . . . ."); *United States v. Dodier*, 630 F.2d 232, 234-35 (4th Cir. 1980) ("The minimal intrusion on privacy rights by an investigative stop is permissible if 'the police officer [can] point to specific and articulable facts which . . . reasonably warrant that intrusion,'" quoting *Terry v. Ohio*, 392 U.S. at 21).

Whether an investigatory stop of limited intrusiveness is controlled by the fourth amendment therefore depends on the justification for even that limited intrusion. This rule is rooted in the Court's interpretation of the fourth amendment as embodying the dual concerns of protecting privacy interests and avoiding arbitrary offi-

cial action. *See Michigan v. Summers*, 452 U.S. 692, 701 & n.14 (1981); *Reid v. Georgia*, 448 U.S. at 441; *Brown v. Texas*, 443 U.S. at 51 (fourth amendment "assure[s] that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field"); *Delaware v. Prouse*, 440 U.S. at 654, 661, 662-63; *United States v. Brignoni-Ponce*, 422 U.S. at 882; *Terry v. Ohio*, 392 U.S. at 14 & n.11, 15, 21-22. If the threshold fourth amendment inquiry were limited to consideration of the physical circumstances of the stop, apart from the justification for the officers' approach, the officers' discretion to make arbitrary or discriminatory stops would be unfettered. *See* A Model Code of Pre-Arraignment Procedure § 110.2(1)(a) & Commentary 262-63, 269-70, 273, 276-77 (1975).

It is important to remember that *Terry* stops are valid only because of an exception to the usual rule requiring "advance judicial approval of searches and seizures through the warrant procedure." *Id.* at 20. The exceptions to this general rule are motivated by necessity but are limited by the requirement that judicial approval be available after the fact if it is impossible in advance:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. at 21 (footnote omitted). Because reviewability is central to the scheme of this exception to the warrant requirement, declining to examine the justification for police conduct would be to abdicate a responsibility and to invite arbitrariness.

It is true that the Supreme Court has noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Reid v. Georgia*, 448 U.S. at 440 n.*; *Terry v. Ohio*, 392 U.S. at 19 n.16. Asking a

passerby for directions, *see United States v. Viegas*, 639 F.2d at 44, or questioning possible witnesses of a crime, *see* A Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (1975), for example, may invoke no fourth amendment concerns. The reason for these exceptions, however, is not that "the law does not concern itself with trifles"; it is because these situations, unlike inherently confrontational ones, do not pose any risk of arbitrary or abusive exercise of discretion. But whenever an officer identifies himself as a drug enforcement agent and singles out an individual for questioning, the implication of suspicion and the potential for abuse are clear.

This is not to say that all intrusions, no matter how minimal, in which the risk of arbitrariness is present must be justified by a uniform degree of suspicion. Such a rule was rejected in *Terry v. Ohio*, 392 U.S. at 16-19. Rather, the test is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Id.* at 19. Less suspicion is required to initiate a minor intrusion, therefore, than to justify a more severe restriction on liberty.

In assessing reasonableness the court must weigh the importance of the governmental and individual interests. *See Michigan v. Summers*, 452 U.S. at 702. It is not enough to say that, in a case like the present one, the limited nature of the intrusion makes the individual interest inconsequential when compared with the government's overwhelming interest in controlling drug trafficking. If the government's general interest were at issue, it would outweigh almost any individual interest and stretch fourth amendment protections wafer thin. That kind of balancing, however, is improper because the court's duty is to "evaluate the reasonableness of a *particular* . . . seizure in light of the *particular* circumstances." *Terry v. Ohio*, 392 U.S. at 21 (emphasis added). *See* A Model Code of Pre-Arraignment Procedure, Commentary 276-77 (1975). When an officer cannot articulate suspicions concerning a particular individual, the government's interest in controlling drug trafficking by that individual is small. *Brown v. Texas*, 443 U.S. at 52.

In fact, the government then has an interest in avoiding arbitrariness.

The district court, relying upon *Reid, supra*, held that at the time the police officers approached Moya on the cab line, the officers did not have a basis for an articulable suspicion that Moya was involved in criminal activity. D. Ct. op. at 6, 14.

The district court found "that Moya showed no hesitancy in agreeing to respond to [the agents'] questions or in agreeing to remove himself from the taxi line and enter the terminal foyer." D. Ct. op. at 8, 14. This finding is inconsistent with the testimony of the agents, and is clearly erroneous. The agents testified that although Moya agreed to the agents' initial request to speak with him, he refused to give them any identification and denied that he had any. D. Ct. op. at 8. This version of the facts was accepted by the district court; it was critical to the district court's determination that a basis for articulable suspicion had arisen:

> The subsequent interview, however, was ample to justify detention of the luggage. The first question addressed to Moya at the time he was standing in the cab line was a request for identification. Moya's contention that he had none was, of course, suspicious in itself.

D. Ct. op. at 14.

This cab line exchange raises a critical question. When a person refuses to comply with a police request for identification, does this form a basis for articulable suspicion? In *Brown v. Texas, supra*, the fact that a citizen angrily "refused to identify himself and angrily asserted that the officers had no right to stop him," 443 U.S. at 49, did not give the officers a right to further detain him. *Id.* at 50. The police officers observed Brown in a high drug area, "looking suspicious," walking away from another person. These observations, in addition to Brown's refusal to identify himself, however, were insufficient to justify further detention of Brown. *Id.* at 52.

On the basis of *Brown*, then, if Moya, instead of denying he had identification, had refused to give the agents any identification, the agents would have had no basis for an articulable suspicion that Moya was involved in criminal conduct. The result, therefore, of the majority's holding is that a citizen must assert his fourth amendment right in only one manner—or lose it. Such a strict rule favoring police over citizens is contrary to the spirit of the fourth amendment, to the balancing of private and public interests, and to our abhorrence at arbitrary police conduct.

It is clear that Moya was "seized" at some point during the encounter. After refusing to give the officers any identification, Moya agreed to step inside the terminal. This acquiescence does not amount to consent. A reasonable person faced with continued police questioning would not feel free to walk away. *See Terry v. Ohio*, 392 U.S. at 18 ("a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope"); *id.* at 28-29 ("The Fourth Amendment proceeds as much by limitations upon the scope of government action as by imposing preconditions upon its initiation."); *United States v. Gooding*, 695 F.2d 78, 82 (4th Cir. 1982) (prolongation of questioning when preliminary questions fail to raise any suspicion contributes to finding that defendant was detained); *United States v. Bautista*, 684 F.2d 1286, 1290 (9th Cir. 1982) (prolonged questioning must be justified); *United States v. Berry*, 670 F.2d 583, 597 (11th Cir. 1982) (*en banc*) ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention.") (footnote omitted). *See also United States v. Jodoin*, 672 F.2d 232, 235 (1st Cir. 1982) (when answers to initial questions produce additional suspicion they justify further questioning).

Even if Moya consented to step inside the terminal, the tone of the police-citizen encounter abruptly changed thereafter. After producing his plane ticket, Moya asked

what the stop was all about. D. Ct. op. at 3. The agents ignored the question and continued to press Moya for additional identification. *Id.* Surely the aura of coercion must be found here when the officers refused to answer Moya's question. Their refusal cannot be construed as creating a friendly, relaxed, and everyday tone to the police-citizen encounter, and it is clear error to conclude otherwise.

Unlike the defendant in *Black*, Moya's identification provided no additional basis for suspicion. Black was travelling under an alias on a one-way first class ticket. 675 F.2d at 137. Black told the officers he had been picking coconuts to earn money. *Id.* Black's story was implausible. *Id.* Moya's identification, in contrast, was completely in order. D. Ct. op. at 3.

The only remaining fact, the denial of the plastic bag glimpsed as Moya produced his identification is a far cry from the narcotics placed in plain view in *Black*. 675 F.2d at 138. That denial is entitled to even less weight as a basis for an articulable suspicion than the earlier denial of identification. Obviously Moya did not want to produce the plastic bag. The district court held, in accordance with *Brown*, that Moya had a valid fourth amendment right to refuse to produce the plastic bag. D. Ct. op. at 16. Indeed, the district court found that Moya's fourth amendment rights were violated when the police officers seized the plastic bag. *Id.* at 17. It defies logic to conclude on the one hand that the police officers could not seize the plastic bag, but that on the other the agents could seize the shoulder bag which contained the plastic bag. I cannot endorse this illogical result or the majority's further erosion of the fourth amendment's guarantees.

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Opinion by Judge Coffey
Judge Swygert Dissenting

JUDGMENT—WITHOUT ORAL ARGUMENT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 22, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. No. 81-2225 CESAR MOYA, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 CR 341 Judge Bernard Decker

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 13, 1983

Before

Hon. JOHN L. COFFEY, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 81-2225 CESAR MOYA, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 CR 341 Judge Bernard Decker

On consideration of the "MOTION FOR AN EXTENSION FOR FILING A PETITION FOR REHEARING AND TO STAY THE COURT'S MANDATE" filed herein on April 5, 1983, by counsel for defendant-appellant,

IT IS ORDERED that said Motion is hereby GRANTED to the extent that defendant-appellant's Petition for Rehearing shall be due with this court on or before April 20, 1983.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appelle* vs. CEASAR MOYA *Defendant-Appellant*	No. 81-2225

PETITION FOR RE-HEARING IN BANC

The majority decision in U.S.A. v. Moya No. 81-2225 is in conflict with Florida v. Royer 51 LW 4293 No. 80-2146 decided March 23, 1983 however, the dissent opinion in Moya is consistent with the said ruling of the United States Supreme Court in Florida v. Royer.

NOW COMES, the Defendant-Appellant, CEASAR MOYA, by and through his attorney's, STEVEN B. MUSLIN, LTD., and respectfully petitions this court to grant him a re-hearing in Banc of this matter. In support thereof, Petitioner states as follows:

1. This decision was handed down by a majority panel affirming the District Courts judgment and included a strong dissenting opinion.

2. This case was decided on March 22, 1983, without the benefit and guidance of Florida v. Royer 51 LW 4293 United States Supreme Court # 80-2146 decided the next day, March 23, 1983.

3. The decision in this case is in conflict with the United States Supreme Court's decision in Florida v. Royer 51 LW

4293 = 80-2148 and that a Petition of Certiorari to the United States Supreme Court in this matter would have merit.

4. Dissenting opinion in this case is consistent with the Supreme Court's decision in Florida v. Royer 51 LW 4293.

5. That the subject matter of both decisions is the "drug courier profile" and the issues of both decisions are whether or not the Defendant-Appellants' fourth Amendment rights prohibiting unreasonable search and seizures were violated.

6. The majority opinion in this case held that where there was a lack of effective (Legal) alternatives available to the law enforcement officers, a warrantless and illegal seizure from the Petitioner of property in his possession was reasonable.

7. That the dissenting opinion found this particular conclusion of the majority illogical and an erosion of the fourth Amendment guarantees.

WHEREFORE, Petitioner respectfully prays the United States Court of Appeals for the Seventh District grant a re-hearing in Banc.

Respectfully submitted,
Steven B. Muslin

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263-7249

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 16, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 81-2225 CESAR MOYA, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 CR 341 Bernard M. Decker, *Judge.*

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-mentioned cause by the defendant-appellant, Cesar Moya, no judge in active service has requested a vote thereon, and a majority* of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Judge Luther M. Swygert voted to grant the petition for rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA vs. CESAR MOYA	No. 80 CR 341

MEMORANDUM OPINION AND ORDER

Defendant Cesar Moya has been charged in a one-count indictment with possession of cocaine with intent to distribute. This constitutes a crime in violation of the provisions of 21 U.S.C. 841(a)(1). Currently pending is Moya's motion to suppress certain evidence. Since the sole contested questions of fact relate to the motion to suppress, defendant has chosen to waive his right to a jury trial in the event the motion is denied. On the basis of this waiver, the court heard evidence in this case on December 1, 1980. Having carefully reviewed the record and the briefs of the parties, the court hereby enters the following findings of fact and conclusions of law.

On March 20, 1980, Moya was observed deplaning from Delta Airlines Flight 142. Flight 142 was arriving at Chicago's O'Hare Airport from Miami, Florida. The flight was observed by agent Kenneth Labik, of the Drug Enforcement Administration, and Officer Thomas Kinsella, of the Chicago Police Department. Labik and Kinsella were observing Flight 142 because they had been informed by their agencies that Miami was a source city for much of

the illegal drug traffic into Chicago. There was no direct evidence introduced at trial to substantiate this belief.[1]

After deplaning, Moya walked across the concourse from the arrival gate and surveyed the crowd. He then walked down the concourse towards the main terminal, looking backwards, over his shoulder periodically. During this time Labik and Kinsella were following Moya in order to keep him under observation. Before reaching the main terminal, Moya entered a men's room, followed by Labik. Moya checked all of the enclosed stalls and, discovering that they were all full, left the men's room. Upon reaching the main terminal, Moya again entered a men's room, this time followed by Kinsella. Moya found an open stall, entered it, closed the door, stood there for several minutes, and then left. Moya did not use the toilet. On leaving the men's room, Moya went downstairs to the arrival area of the terminal and entered a cab line. He did not go to the baggage claim area, and his sole piece of luggage was a shoulder bag, which he had carried off of the airplane.

As he was standing in the cab line, Moya was approached by Labik and Kinsella, who promptly identified themselves and asked Moya if they could speak with him. Moya said that they could. Labik and Kinsella testified that at this point they asked Moya for some identification, and that Moya denied that he had any. Moya testified that he was not asked for identification at this point. In any event, Moya was asked if he would agree to move back inside the

[1] When evidence to this effect was first introduced, defendant's attorney objected to it as hearsay. The court overruled the objection, but admitted the testimony for the sole purpose of establishing the agent's motivation in choosing to observe this particular flight. The evidence was not admitted for the purpose of establishing that Miami is in fact a source city for much of the illegal drug traffic into Chicago.

terminal building in order to avoid the night chill and the pedestrian traffic. Again, Moya agreed. Once inside the building's foyer the questioning resumed. Moya was asked his name, which he gave as Cesar Moya, and he was asked for his airline ticket. He produced the ticket which was a one-way fare on Delta Flight 142 in the name of Cesar Moya. After examining the ticket Labik asked Moya for further identification. Moya responded by asking what this was all about. Labik ignored the inquiry, asking again for identification. Moya testified that at about this point he asked to leave, but that Labik and Kinsella would not let him go. Labik denied this. Kinsella did not testify on the point. After his question about the purpose of the interrogation was ignored, Moya reached into a side pocket of his shoulder bag and produced his driver's license. The driver's license was in Moya's name and had his picture on it. In reaching into the pocket, however, Moya gave Labik a view of a corner of a clear plastic bag. Labik asked Moya to produce the bag. Moya denied that he had a plastic bag. Labik told Moya that, "If he wouldn't remove it [the bag], I would." Moya removed the bag, which proved to contain several other clear bags, some small bottles, and some small spoons. Moya told Labik and Kinsella that he used the contents of the bag to carry jewelry. Persuasive evidence adduced at the trial, however, indicates that the contents of the bag consisted of drug paraphenalia. At this point Labik and Kinsella asked Moya's permission to search the bag, telling him that he had a right to refuse. Moya refused. Labik and Kinsella then detained the bag in order to attempt to obtain a search warrant, and Moya left. Shortly thereafter, a trained police dog picked out Moya's bag from among a group of six others. On the basis of this showing, a search warrant was obtained. The validity of the warrant is not disputed. A search of the bag revealed that Moya had been carrying

501.77 grams of 35% cocaine. This quantity of cocaine has a street value of between $40,000 and $50,000. This is more cocaine than one person would normally hold for his personal use.[2]

The central issue in this case is whether or not the seizure of Moya's bag was constitutionally permissible. If that seizure was permissible, then, as defendant admits, the ultimate search of the bag was proper, and the evidence obtained is admissible. If, however, the seizure was improper, then the evidence obtained from searching the bag is "fruit of the poisonous tree" and, as such, it must be suppressed. *Wong Sun* v. *U.S.*, 371 U.S. 471 (1963). Agent Labik testified that he "had no intention or thought of getting a search warrant or seizing that bag" at the time he and Kinsella approached Moya at the cab line. Consequently, the propriety of this seizure turns on two questions: (1) Was Moya "seized" in violation of his Fourth Amendment rights during the period when he was being questioned by Labik and Kinsella. (2) Assuming that the questioning did not amount to an unconstitutional seizure, did anything that came to light during the course of the questioning, when taken in conjunction with Moya's previous behavior, justify seizure of the bag.

Seizure of Moya's person.

Moya argues that, if his interview with Labik and Kinsella amounted to a seizure, then it was an improper one.

[2] There are a variety of conflicts in the testimony not discussed above. Thus, for example, Moya asserts that the interview lasted 40 minutes, whereas the agents contend that it lasted only 15. Similarly, there is some dispute over the conditions under which the agents took a photograph of Moya after his bag was seized. For reasons that will become clear, the court does not view any of these disputes as material to the controlling issues in this case.

In this Moya is correct. In *Reid* v. *Georgia*, ___ *U.S.* ___, 100 S.Ct. 2752 (1980), the Supreme Court was considering an appeal from the State Supreme Court of Georgia. There, as here, the defendant had been interrogated at an airport by a DEA agent. The agent observed Reid deplaning from a Fort Lauderdale flight. He and another male passenger were carrying identical flight bags. Reid and this other passenger walked down the airport concourse separately, but at the end of the concourse they joined one another and left the building together. During their walk to the main terminal, Reid occasionally looked behind himself towards the second man. Neither man picked up any additional luggage. As they left the main terminal, Reid and the other man were approached by the DEA agent. Subsequent events resulted in seizure of one of the airline bags which turned out to contain cocaine. The court below had presumed that the questioning of Reid and his colleague by the DEA agent was a seizure. Consequently, the sole question before the Supreme Court was whether or not a seizure could be constitutionally justified on these facts. In a *per curiam* opinion from which only Justice Rehnquist dissented, the Court concluded that the DEA agent did not have sufficient grounds for seizing Reid and his partner.

The Court began its argument by emphasizing that,

> "While . . . in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid* v. *Georgia*, 100 S.Ct. at 2753.

In *Reid* the only reasons given for the stop of the defendant were the fact that he had deplaned from a flight arriving from a principal place of origin for cocaine distribution, the fact that defendant arrived early in the morning when law enforcement activity is diminished, the fact that he and his companion apparently were attempting

to conceal that they were traveling together, and the fact that defendant and his companion had no luggage other than their shoulder bags. These observations, taken together, were said to bring *Reid* into conformity with the so-called " 'drug courier profile,' a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics," *id.*, and, therefore, to justify the stop. The Court, however, concluded:

> ". . . that the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.*, at 2754.

Here the reasons given by Labik and Kinsella for suspecting Moya prior to the time they approached him at the cab line were no more substantial than the reasons rejected by the Court in *Reid*. At the time they approached him, Labik and Kinsella knew only that Moya had deplaned from a Miami flight,[3] that he was carrying no luggage other than a shoulder bag, that he had repeatedly scanned the crowd and looked back over his shoulder, and that he had sought the privacy of a washroom stall for some reason other than a desire to relieve himself. As it turned out, of course, Labik and Kinsella were correct to find this behavior suspicious. But it would not be difficult to imagine perfectly innocent explanations for every one of Moya's

[3] As noted above, *supra*, n. 1, at pp. 2-4, there was no evidence introduced at trial that would permit the court to give any weight to the fact that Moya's flight originated in Miami.

actions. If interrogations based on such suspicions are indeed constitutional seizures, then it is likely that numerous innocent people are routinely "seized" in violation of the Constitution every week. Indeed, Labik himself testified that he routinely approaches two or three people a day on the basis of similar suspicions, but that these stops have led to only 70 or 80 arrests during his three years at O'Hare. Thus, as defendant has pointed out, presuming a 5-day work week and a 50-week work year, stops based on the sort of evidence that led to Moya's questioning result in arrests only 3-5% of the time. In short, there is every reason to believe that Moya's questioning would be constitutionally insupportable if that questioning rose to the level of a Fourth Amendment "seizure."[4]

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[4] Arguably to the contrary is *U.S.* v. *Mendenhall*, U.S. , 100 S.Ct. 1870 (1980). There, by a 5-4 vote, the Court found another airport drug stop to be constitutional. Two of the justices approving the stop did so on the grounds that the stop did not amount to a "seizure" within the meaning of the Fourth Amendment. 100 S.Ct. 1873-1880 (per Stewart and Rehnquist). Four of the justices, dissenting, found that the stop amounted to a seizure and that the police lacked adequate grounds to justify their behavior. 100 S.Ct. at 1883-1889 (per White, Brennan, Marshall and Stevens). The remaining three justices declined to reach the question of whether or not a "seizure" had occurred, holding that even if defendant had been seized, the police had adequate grounds for doing so. Since only three of the justices concluded that the facts of *Mendenhall* comprised a constitutionally permissible seizure, this court hesitates to rely on that decision as establishing when constitutionally significant stops are lawful. The opinion in *Reid*, joined in by eight of the justices, seems a surer guide. Additionally, the court notes that the record in the *Mendenhall* case was stronger than the record here. For one thing, the agents in that case testified that Ms. Mendenhall gave the appearance of being extremely nervous. No similar testimony was adduced here. Moreover, the prosecution in that case established a better foundation to indicate why each of the elements of the "drug courier profile" should be regarded as suspicious. *See* 100 S.Ct. at 1882-1883.

Moya, of course, contends that the questioning did trigger the Fourth Amendment's protections. He is mistaken. Not every contact between a law enforcement officer and the public is a matter of constitutional dimensions. Here the undisputed testimony shows that Labik and Kinsella did not engage in any show of force in approaching Moya, that they did not lay hands on him at any time, and that Moya showed no hesitancy in agreeing to respond to their questions or in agreeing to remove himself from the taxi line and enter the terminal foyer. Moreover, Moya himself characterized the officers' tone of voice and attitude as "relaxed" throughout the encounter.[5] While Moya did testify that, at one point, he was barred from leaving, Labik directly and expressly contradicted this testimony. The court finds Labik's account the more credible. On the whole, Labik gave a more precise, detailed narrative of the relevant events. Moreover, his was an account that was largely corroborated by Kinsella's testimony and by the affidavit filed in support of the search warrant that was ultimately issued in this case. Finally, as a law enforcement officer Labik is an experienced and trained observer whose memory can be given particular credence. Given all of these circumstances, it is apparent that Moya would have been free to walk away from Labik and Kinsella at any time, that a reasonable man in his position would have realized this, and, therefore, that his participation in the questioning was entirely voluntary. Under these circumstances, no

[5] Along the same lines, it is worth noting that Moya did not feel compelled to comply with all of the agents' requests and that they did not insist that he do so. Thus, for example, Moya testified that he was asked to permit the agents to inspect his boots. He refused to do so, and this refusal was honored. Again, the agents asked Moya's permission to search his shoulder bag. He refused to give them permission and no search occurred until a warrant was subsequently obtained.

constitutionally cognizable seizure can be said to have taken place.

In *United States* v. *Mendenhall*, U.S. , 100 S.Ct. 1870 (1980), the Supreme Court was faced with another airport narcotics interrogation. There, as here, DEA agents approached an air traveller whose behavior they considered suspicious in order to ask her a few questions. As was also true in this case, the agents in *Mendenhall* revealed their identities to the defendant without any show of force or any laying on of hands. While the encounter eventually led to a more intensive confrontation, at least initially the agents merely asked Mendenhall for her ticket and some identification.

Writing the lead opinion in the case, Justice Stewart concluded that no constitutional questions were raised by the stop because it was not sufficiently intrusive to constitute a "seizure." Contending that several of the Court's previous opinions had expressly refrained from deciding whether mere questioning of a cooperative citizen invoked Fourth Amendment considerations, the opinion took as its keynote the Court's earlier observation in *Terry* v. *Ohio*:

> "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred. *Mendenhall*, 100 S.Ct. at 1876, *quoting Terry*, 392 U.S. 1, 19 n. 16 (1963).

The opinion went on to emphasize that any other construction of the scope of the Fourth Amendment's protection would extend that provision beyond any rational understanding of its policy basis:

> "We adhere to the view that a person is 'seized' only when by means of physical force or a show of authority,

> his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between police and citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" [Citation omitted.] *Mendenhall*, 100 S.Ct. at 1877.

On the basis of this analysis, Justice Stewart enunciated the following test for determining whether or not a seizure has occurred:

> "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

Patently, application of this test to the facts of this case indicate that Moya was not "seized" by Labik and Kinsella.

Arguably, however, this court should not view Justice Stewart's opinion as controlling. Only Justice Rehnquist joined in Stewart's opinion, and the three concurring Justices expressly declined to adopt Justice Stewart's analysis of the Fourth Amendment's scope. These Justices did not reach the seizure question, holding, instead, that the officers in the *Mendenhall* case had sufficient grounds to warrant their stop of the defendant even if the constitutional protections were applicable. Writing for these concurring Justices, Justice Powell stated that he was not inclined to address the seizure question because it had not been prop-

erly raised below. He noted, however, that the issue was "extremely close." 100 S.Ct. 1880, n.1.

In addition to the three concurring Justices, there were four dissenters who declined to follow Justice Stewart's reasoning. While they too doubted that the issue was properly before the Court, the dissenters, in an opinion written by Justice White, expressly disapproved Justice Stewart's holding. They argued that:

> "In *Terry* we 'emphatically reject[ed]' the notion that a 'stop' is outside the purview of the Fourth Amendment because . . . [it is not a] "seizure" within the meaning of the Constitution.' *Terry* v. *Ohio*, 392 U.S. at 16 . . . We concluded that 'the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security and to make the scope of the particular instrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.' *id.* at 18 n. 15." *Mendenhall*, 100 S.Ct. at 1884.

The dissenters' argument, however, begs the question. While it is undeniable that *Terry* was meant to bring all police "intrusions . . . upon personal security" within the Constitution's protections, the issue raised by Justice Stewart is precisely that of when such an "intrusion" has taken place.

Indeed, as Justice Stewart points out, *Terry* itself expressly left this question open. In that case the police officer involved "had been a policeman for 39 years and a detective for 35 and . . . [he] . . . had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 35 years." 392 U.S. at 2. While the officer was unable to articulate precisely what it was about the defendants' conduct that first attracted his attention, his continued surveillance of the defendants led him to believe that they were "casing" a store in preparation for a robbery. At this point he concluded that

> "the situation was ripe for direct action . . . [and he] . . . approached the three men, identified himself as a police officer and asked for their names. . . . When the men 'mumbled something' in response to his inquiries . . . [the officer] . . . grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between . . . [the officer] . . . and the others, and patted down the outside of his clothing." *Id.*, at 6-7.

This "frisk" of Terry eventually led to the arrest and conviction of Terry and one of his companions on charges of possession of a concealed weapon. The case was before the Court on the issue of whether the weapons uncovered by the frisk were admissible evidence. In reviewing this matter, the Court recognized that the threshold question was whether and when a constitutional "seizure" had taken place. Rejecting the rule proposed below—that no seizure occurred until the point at which defendants were actually arrested—the Court had little trouble finding an earlier seizure on the facts before it:

> "In this case there can be no question . . . that . . . [the police officer] . . . 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for . . . [the Officer] . . . to have interfered with petitioner's personal security as he did." *Id.*, at 19.

The Court, however, appended a footnote to this passage emphasizing what issues it did not intend to reach:

> "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and interrogation. Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. . . . We cannot tell with any certainty upon this record whether any such 'seizure' took place here prior to . . . [the officer's] . . . initiation of physical contact for purposes of searching Terry for weapons,

> and we may thus assume that up to that point no intrusion upon constitutionally protected rights had occurred." *Id.*, at 19 n.16.

The point is that the *Terry* decision explicitly recognized that not all contacts between a police officer and a suspect are automatically seizures, and that, in that case, it was an open question as to whether a seizure had taken place at the time when the officer had merely approached Terry and asked him his name. Consequently, to argue, as did the *Mendenhall* dissenters, that, under *Terry*, an individual is constitutionally seized every time he is approached by a police officer whose suspicions have been aroused and who wishes to ask the citizen some questions is to simply misread that opinion. Moreover, as Justice Stewart points out, it is to torture the term "seizure" beyond all recognition. Certainly, so long as the cooperation is truly voluntary, the suspect's liberty cannot be said to be infringed at all. In short, this court views Justice Stewart's reading of the *Terry* decision as more accurate, and more consistent with the language and policies of the Fourth Amendment than the reading advocated by the *Mendenhall* dissenters. As has already been noted, the principles articulated in his opinion dictate that no constitutional seizure of Moya's person occurred in this case.

It is not, however, disputed that Labik and Kinsella detained Moya's flight bag or that this constituted a seizure of Moya's property. Consequently, the question which remains is whether or not this seizure was permissible.

Seizure of Moya's property

In *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), the Seventh Circuit held that defendants' constitutional rights were not violated where their bags were detained for the purpose of obtaining a search warrant, where the bags were detained subsequent to an airport narcotics interrogation,

and where, as a result of the interrogation, the DEA agents "had reasonable suspicion to believe that the bags contained contraband." 626 F.2d at 26. The court expressly rejected defendants' contention that a temporary seizure of their luggage was only proper on a showing of probable cause. 626 F.2d at 24-26.

Thus, the issue in this case is whether Labik and Kinsella had a "reasonable suspicion" that Moya's bag contained contraband at the time that they detained it. The court concludes that they did.

For the reasons already given, the court does not believe that Labik and Kinsella had sufficiently well supported suspicions regarding Moya to support a seizure of the bag at the time they approached him in the taxi line. The subsequent interview, however, was ample to justify detention of the luggage. The first question addressed to Moya at the time he was standing in the cab line was a request for identification. Moya's contention that he had none was, of course, suspicious in itself. The suspicious nature of this response was underlined when a subsequent request for identification in the building foyer led Moya to produce his driver's license, thus giving lie to his initial statement.

Moya denies that he initially refused to produce his license. However, both Labik and Kinsella testified to the contrary. The reasons given previously by the court for crediting the agents' testimony above that given by Moya are equally applicable here. Additionally, the record suggests a plausible reason why Moya might have hesitated to produce his license. The driver's license was in the same pocket of his travel bag as the drug paraphenalia that emerged at a later point in the questioning. Moya might well have feared that opening that pocket of the bag would permit the agents to view the drug paraphenalia.

In addition to dissembling about his possession of identification, one additional event during the questioning gave Labik and Kinsella reasonable grounds for suspecting that Moya was engaged in a criminal enterprise. When Moya finally reached into the pocket of his travel bag to produce his license, Labik glimpsed a corner of a clear plastic bag. He promptly asked Moya to remove this bag and show it to him. Moya did not simply refuse to comply with this request, rather he insisted that no plastic bag existed. This was a lie and Labik knew that it was the moment it was uttered. Thus, by the time that Moya initially failed to produce the plastic bag, he had given Labik and Kinsella several grounds for suspecting that his travel bag contained contraband: His behavior in walking from the arrival gate to the taxi stand was sufficient to arouse the officers' inchoate suspicions. After they approached Moya and began to question him, these inchoate suspicions had been sharpened by the disclosure that Moya was hesitant to provide them with information about his identity and by the disclosure that Moya was carrying a plastic bag whose contents he wished to keep a secret. While this information taken as a whole may not have amounted to probable cause to believe that the bag contained contraband, it certainly gave Labik and Kinsella "reasonable and articulable" grounds for suspecting that this was the case. Consequently, if the bag had been detained at this point, the propriety of the seizure would have been clear. Unfortunately, several significant events intervened between Moya's attempt to disown the plastic bag and the seizure of the travel bag.

After Moya denied having a plastic bag, Labik repeated his request that the bag be produced and stated that "if he [(Moya)] wouldn't remove it, I [(Labik)] would." It was immediately following this threat that Moya handed over

the plastic bag. Thus, production of the drug paraphenalia was not a voluntary act. It is well established that a citizen has a privacy interest, cognizable under the Fourth Amendment, in protecting against searches of his luggage. It is also well established that, absent "exigent" circumstances, this interest can only be overridden by demonstrating to the satisfaction of an authorized judicial officer that probable cause to search the luggage exists. *Arkansas* v. *Sanders*, 442 U.S. 753 (1979); *U.S.* v. *Chadwick*, 433 U.S. 1 (1977). Here, no exigent circumstances were present.[6] Thus, the order compelling Moya to disclose the contents of his shoulder bag amounted to an unconstitutional warrantless search. Because this is the case, and because it is also the case that discovery of the drug paraphenalia was at least partially responsible for Labik's and Kinsella's decision to detain the luggage, it may be that any evidence discovered as a result of that detention is "fruit of the poisonous tree." The court, however, declines to reach this conclusion.

Essentially, this argument for suppressing the contents of Moya's bag turns on the likelihood that Labik and Kinsella may have subjectively been motivated to seize the bag because of unconstitutionally obtained information. However, to require suppression of the evidence on the basis of this subjective causal link where alternative con-

[6] This was not a search incident to an arrest, and there is no indication that the agents feared that the plastic bag contained a dangerous weapon. Additionally, since they had sufficient grounds for detaining the luggage at this point, the agents could not reasonably have feared that the luggage would pass out of their control. While it is arguable that the plastic bag was in "plain view" once Moya opened the side pocket, this does not justify a search of the shoulder bag or a seizure of the drug paraphenalia. *See Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971) ("Plain view *alone* is never enough to justify a warrantless seizure.").

stitutional grounds for the seizure exist would entail expanding the "fruit of the poisonous tree" doctrine beyond its traditional and proper bounds.

"Fruit of the poisonous tree", like other forms of the exclusionary rule, is designed primarily as a prophylactic against police misconduct. The notion is that the police will be deterred from violating citizens' rights in the course of criminal investigations if the principal incentive for such conduct—the expectation that admissible evidence will come to light—is removed. *E.g., Brown* v. *Illinois*, 422 U.S. 590, 599-600 (1975). Application of the doctrine, thus, is not intended to vindicate the *rights* of the individual defendant, so much as it is intended to further the social *policies* favoring police restraint and the integrity of judicial proceedings. *Brown, supra.* But any application of the exclusionary rule, by definition, entails suppression of material evidence in a criminal trial: a result which is patently inconsistent with certain other social policies, namely, those favoring the prosecution of crime. As a consequence, in each application of the exclusionary rule,

> "two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protections of that realm of privacy left free by [the] Constitution . . ." *Nardone* v. *U.S.*, 308 U.S. 338, 340 (1939).

This tension is built into all forms of the exclusionary rule, and it is the touchstone regulating the rule's limitations. Thus, the Supreme Court has never treated "fruit of the poisonous tree" as an omniverous doctrine:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence

> to which instant objection has been made has come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *U.S.*, 371 U.S. 471, 487-488 (1963). *Quoting*, Maguire, *Evidence of Guilt* 221 (1959).

Specifically, the Court has carved out two exceptions to the doctrine. First, it has held that the exclusionary rule in inapplicable where the evidence at issue is not, in reality, "fruit" of an unlawful act, but, instead, has been "come at" from a source "independent" of the unlawful conduct. *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385, 392 (1920); *Costello* v. *U.S.*, 365 U.S. 265, 278-281 (1961). Additionally, the Court has recognized that the exclusionary rule is inapplicable where the causal link between the unlawful conduct and the discovery of the disputed evidence has been "so attenuated" by intervening factors "as to dissipate the taint." *Nardone*, *supra*, at 341. *See*, *Wong Sun*, *supra*, at 484-486, 491; *Brown*, *supra*, 597-605.

This case probably does not fall strictly within either of these exceptions to the fruit-of-the-poisonous-tree doctrine. The discovery of the drug paraphenalia was clearly a prime factor in the officers' decision to detain Moya's luggage. Thus, it can hardly be said that the ultimate discovery of cocaine was "come at" from a source of information wholly independent of the illegal search. Additionally, since the unlawful search was obviously calculated to produce evidence that Moya was carrying contraband; since the decision to detain the bag followed within a matter of minutes after discovery of the drug paraphenalia; and since discovery of the cocaine was a direct result of the decision to detain the luggage, it also cannot be concluded that the causal link between the unlawful search and the discovery of the cocaine was "so attenuated as to dissipate the taint." *See Brown*, 422 U.S. at 603-604. Still, this does not mean

that the fruit-of-the-poisonous-tree doctrine is properly applicable to these facts.

There is nothing in the Court's opinion to indicate that these limitations on fruit-of-the-poisonous-tree reasoning represent anything more than a common sense recognition of two points beyond which the doctrine's deterrent policies are outweighed by the costs it imposes on effective law enforcement. Indeed, it has always been this balancing process that has controlled the scope of the doctrine and the application of its various limitations. As a result, it would be inaccurate to view the exceptions thus far expressly recognized by the Court as written in stone. Certainly, their formulation was not intended to exclude careful case-by-case evaluation of the doctrine's applicability. Broadly speaking, they seem merely to stand for the principle that law enforcement efforts are to be left in the condition they would have occupied had no unlawful conduct occurred.

Indeed, several circuits have, under appropriate circumstances, declined to exclude evidence even though the evidence was come at, at least in part, from an unlawful source and even though the link between the unlawful source and the discovered information was not attenuated. In *U.S.* v. *DeMarce*, 513 F.2d 755 (8th Cir. 1975), for example, discovery of a rifle used in the crime was directly facilitated by statements made by the defendants under unlawful conditions. Despite its holding that the statements had to be suppressed, the court concluded that the rifle was admissible because the police had independent information which "would" have led to recovery of the gun in any event. 513 F.2d at 758. Similarly, in *U.S.* v. *Sor-Lokken*, 557 F.2d 755 (10th Cir. 1977), *cert. denied*, 434 U.S. 894 (1977), the court approved admission of a rifle where police initially discovered the rifle during the course of an unlawful search. The rifle was eventually seized during a second, this time

lawful, search. The court concluded that the rifle was not fruit of the poisonous tree because, prior to their unlawful conduct, the police had independent information as to the rifle's whereabouts. *See also, U.S.* v. *Edwards*, 602 F.2d 458, 469 n. 12 (1st Cir. 1979).

Like these other courts, the Seventh Circuit has taken a flexible attitude towards application of the fruit-of-the-poisonous-tree doctrine. Thus, it has been held that evidence is admissible in this Circuit even though partially obtained as a direct result of unlawful conduct so long as a legitimate source of information would "inevitably" have led to discovery. *U.S. ex rel. Owens* v. *Twomey*, 508 F.2d 858, 865-866 (7th Cir. 1974). In the same vein is the court's opinion in *U.S.* v. *Piet*, 498 F.2d 178 (7th Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974). There FBI agents had been reliably informed that stolen property was being stored in a warehouse in which one of the defendants had been leasing space. On the basis of this information, the FBI searched the warehouse without a warrant, locating the stolen goods. The FBI then obtained a warrant, returned to the warehouse, and seized the contraband. The Seventh Circuit held that the initial search of the warehouse had been permissible because the agents had been voluntarily admitted by the warehouse foreman. However, the court went on to hold that,

> "Even if the March 23 search had been unlawful, that investigation would not have tainted the March 26 search and seizure of the edgers [the contraband]. Prior to the March 23 search, Johnson [the informant] told FBI agents that Markham [one of the defendants] had told him to deliver the stolen edgers to the Able warehouse. Thus, an independent basis existed to support the agents' suspicion that Markham was storing stolen goods at the Able facility." 498 F.2d at 181.

In this case Labik and Kinsella detained Moya's shoulder bag after unlawfully obtaining information about the bag's

contents. Even though the unlawfully obtained information was a motivating factor in the decision to seize the bag, the court concludes, for the reasons summarized above, that Labik and Kinsella had previously accumulated in a lawful manner sufficient knowledge to justify the bag's detention. This finding brings this case squarely within the holding in *Piet* and the other court of appeals decisions cited above.

Moreover, this finding makes an exception to the fruit-of-the-poisonous-tree doctrine proper under the policies that regulate that rule's application. The point of the exclusionary rule is to assure that the police will not have an incentive for violating a citizen's constitutional rights. This concern is satisfied so long as the police are not permitted to put themselves in a better investigatory position than they would have occupied but for the unlawful conduct. In a case such as this one, where the officers making the seizure have properly obtained information sufficient to justify their conduct, suppression of the evidence because the seizure was also prompted by improperly obtained knowledge would leave the police worse off than if no wrongdoing had occurred. Such a rule has substantial deterrent value only if it is assumed that police routinely transgress on constitutional rights even when they have no investigatory reason for doing so. The facts of this case, of course, are adequate to demonstrate that the rush of events may prompt a police officer to engage in such gratuitous wrongdoing. But the court declines to conclude that there is any substantial risk that this is commonplace behavior or that such motiveless conduct would be substantially restrained by application of the doctrine. Certainly, the policies favoring "the stern enforcement of the criminal law," *Nardone*, 308 U.S. at 340, would militate against suppressing evidence whose seizure could readily have been supported by good, lawful police work. In short, suppression of this evidence

would not be consonant with the policies that underlie the fruit-of-the-poisonous-tree doctrine and its various limitations.

Since this policy analysis is well supported by the case law in this circuit, this court cannot but conclude that the temporary seizure of Moya's shoulder bag was not tainted by the unlawful seizure of the drug paraphenalia. Since the court has already concluded that seizure of the bag was otherwise proper, it follows that defendant's motion to suppress the cocaine which came to light as a result of that seizure must be denied.

Having found that the cocaine Moya was carrying at the time he was questioned by the police is admissible evidence, there is nothing in this record to raise a reasonable doubt as to Moya's guilt. He was apprehended in possession of roughly 500 grams of cocaine. The uncontested evidence was that this amount of cocaine is more than any person would carry for his individual use. Such a showing suffices to support an inference that the defendant intended to distribute the cocaine in his possession. *U.S.* v. *Muckenthaler*, 584 F.2d 240, 247 (8th Cir. 1978). On the basis of all of the evidence before it, this court concludes that such an inference is appropriate in this case.

Accordingly, this court finds the defendant guilty beyond a reasonable doubt of having violated the provisions of 21 U.S.C. § 841(a)(1) as charged in the indictment.

ENTER:

Bernard M. Decker
United States District Judge

DATED: May 7, 1981.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

No. 83-253

In the Supreme Court of the United States

OCTOBER TERM, 1983

CESAR MOYA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner's encounter with law enforcement officers at an airport constituted an unlawful seizure.

2. Whether the police detention of a shoulder bag for a dog "sniff test" exceeded the permissible duration of an investigative detention of personal effects.

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Constitution and statute:

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21 U.S.C. 841(a)(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-253

CESAR MOYA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 704 F.2d 337. The opinion of the district court (Pet. App. A6-A27) is reported at 561 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on March 22, 1983. A petition for rehearing was denied on June 16, 1983 (Pet. App. A5). The petition for a writ of certiorari was filed on August 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of cocaine with intent to distribute,

in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment to be followed by a four-year special parole term. The court of appeals affirmed. Pet. App. 1-18.

1. As set forth in the decisions of the courts below (Pet. App. 2-4, A6-A9), evidence presented during a suppression hearing showed that on March 20, 1980, a DEA agent and a Chicago police officer on duty at Chicago's O'Hare Airport observed petitioner deplane from a flight from Miami, Florida, carrying a shoulder bag. After deplaning, petitioner walked across the concourse, surveyed the crowd, and then proceeded toward the main terminal, periodically looking backward over his shoulder. En route, he twice entered restrooms, but did not use the toilet. He then proceeded to the arrival area of the terminal and, without retrieving any additional luggage, entered a taxi line. Pet. App. 2-3, 11, A6-A7.

Their suspicions aroused by petitioner's behavior, the officers approached him, identified themselves, and asked for permission to speak with him. When petitioner agreed, they requested that he display some identification, but he stated that he did not have any. The officers then asked if petitioner would agree to return to the terminal building in order to avoid the night chill and the pedestrian traffic. Petitioner assented and, once inside the foyer, the questioning resumed. After petitioner identified himself and complied with a request to allow the officers to examine his ticket, he was once again asked for identification. When he asked "what this was all about," the officers disregarded the inquiry and repeated their request.[1] Petitioner then reached into a side pocket of his shoulder bag and produced his

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[1]Petitioner testified that at this point he asked to leave but that the officers would not permit him to do so. One of the officers denied this. The district court resolved the factual dispute in favor of the officer's testimony (Pet. App. A13).

driver's license. As he did so, the DEA agent observed the corner of a clear plastic bag in the pocket. When the agent asked him to produce the bag, however, petitioner denied that it existed. Pet. App. 3, A7-A8.

After the agent threatened to remove it himself, petitioner surrendered the bag, which contained several other clear bags, some small bottles, and several small spoons. The officers recognized these items as drug paraphernalia, and they asked petitioner's consent to a search of the shoulder bag. When he refused, they detained the bag in order to summon a drug detecting dog and, if necessary, to attempt to obtain a search warrant. Petitioner, however, was permitted to leave after the officers took his photograph. The officers contacted the Customs Office and, after about three hours, a trained dog arrived and alerted on petitioner's bag after examining it in a lineup with six similar bags. Following the issuance of a warrant, a search of the bag revealed more than 500 grams of cocaine, valued at between $40,000 and $50,000. Pet. App. 3-4, A8-A9.

2. The district court denied petitioner's motion to suppress (Pet. App. A6-A27). The court found that the encounter with the officers did not constitute an unlawful seizure and that the ensuing detention of the bag was lawful. Observing that "the undisputed testimony shows that [the officers] did not engage in any show of force in approaching [petitioner], that they did not lay hands on him at any time, and that [petitioner] showed no hesitancy in agreeing to respond to their questions or in agreeing to remove himself from the taxi line and enter the terminal foyer," the court held that "no constitutionally cognizable seizure can be said to have taken place" (*id.* at A13-A14).

The district court also found that the events that developed during the course of the interview justified a reasonable belief that petitioner's shoulder bag contained contraband. The court did state that the seizure of the small plastic

bag observed by the agent when petitioner produced his identification constituted "an unconstitutional warrantless search" (Pet. App. A21) because the bag was produced at the compulsion of the officers. But the court held that the subsequent seizure of the shoulder bag was untainted because the officers "had previously accumulated in a lawful manner sufficient knowledge to justify the bag's detention" (*id.* at A26).

The court of appeals affirmed (Pet. App. 1-18). The court upheld the district court's determination that petitioner's freedom to leave was not restrained by an overbearing show of authority and therefore that no constitutionally cognizable seizure had occurred (*id.* at 5-8). The court also agreed with the district court's finding that, even before the officers seized the plastic bag, they possessed reasonable suspicion that the shoulder bag contained contraband (*id.* at 9-11). Relying on *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), the court therefore concluded that the officers were permitted to detain the shoulder bag temporarily for further investigation (Pet. App. 8).

Judge Swygert dissented (Pet. App. 12-18). In his view, by the time the officers noticed the plastic bag, the encounter had risen to the level of an unconsented seizure that was not supported by reasonable suspicion.

DISCUSSION

1. Petitioner contends (Pet. 6-9) that his encounter with law enforcement officers at O'Hare Airport constituted an unlawful seizure. This fact-bound question was resolved against petitioner by both courts below, and there is no occasion for this Court to review it.

a. The governing principle is well settled:

> "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the

> officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred".

United States v. *Mendenhall*, 446 U.S. 544, 552 (1980) (opinion of Stewart, J.) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968)). See also *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5 (plurality opinion); *Reid* v. *Georgia*, 448 U.S. 438, 440 n.* (1980). In *Mendenhall*, Justice Stewart explained (446 U.S. at 554 (footnote omitted)):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

In this case, as the district court observed (Pet. App. A13), the undisputed testimony establishes that the law enforcement officers did not engage in any show of force in approaching petitioner, that they did not lay their hands on him at any time, and that petitioner showed no hesitancy in agreeing to respond to their questions and to return to the terminal in order to avoid the weather and pedestrian traffic. The court also noted (*id.* at A13 n.5) that petitioner did not feel compelled to comply with all of the officers' requests and that they did not insist that he do so. For example, petitioner testified that he refused to grant the officers' request to inspect his boots and that they honored the refusal. Under these circumstances, both courts below correctly concluded that "no constitutional seizure of

[petitioner's] person occurred in the case" (*id.* at A18; see *id.* at 6-7).[2]

b. Even assuming that the consensual encounter with law enforcement authorities ripened into a seizure by the time the officers discovered the drug paraphernalia in the clear plastic bag and then seized petitioner's travel bag, the officers at that time had a reasonable suspicion that petitioner was carrying contraband that justified a brief investigatory detention of both his person and the bag. See, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5-6; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 879-883 (1975); *Terry* v. *Ohio*, 392 U.S. at 20-22. As the court below observed (Pet. App. 11), by the time the bag was seized the officers' curiosity had been aroused by petitioner's apparent efforts to detect surveillance upon deplaning, his entry into two restrooms without using the facilities in either one and, after a further survey of the terminal area, his rapid departure carrying only a shoulder bag. These suspicions were significantly heightened when petitioner lied about possessing either any identification or the plastic bag noticed by the officers. In view of all of these factors, the agents had reasonable grounds for suspecting that petitioner was carrying contraband that justified an investigative detention to enable them to verify or dispel their suspicion.

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[2]The correctness of this conclusion is reinforced, not undermined, by the decision in *Florida* v. *Royer*, *supra* (see Pet. 8, 10). The plurality in *Royer* noted that consensual encounters between law enforcement officers and members of the public that involve questioning do not necessarily constitute seizures for Fourth Amendment purposes (slip op. 5-6). True, the plurality concluded on the facts of that case that the encounter ripened into a seizure when the police officers asked Royer to accompany them to a police office while maintaining custody of his driver's license and ticket and without informing him that he was free to leave (slip op. 11). But in this case, by contrast, the police merely asked petitioner to step into the terminal foyer to escape the night chill and took no action to impede his departure if he declined.

2. Petitioner also contends (Pet. 9-10) that the three-hour detention of his shoulder bag exceeded the scope of an allowable investigative seizure. Relying upon *United States* v. *Klein*, 626 F.2d 22, 25-26 (7th Cir. 1980), both the district court and the court of appeals held that the detention in order to obtain a dog sniff was permissible on the basis of reasonable suspicion. Subsequent to the decision below, this Court held in *United States* v. *Place*, No. 81-1617 (June 20, 1983), that the 90-minute detention there of the defendant's luggage for the purpose of arranging a dog sniff exceeded the limits of a permissible investigative stop. That decision, which the court of appeals had no opportunity to consider,[3] is clearly relevant to a determination of the reasonableness of the duration of the seizure in this case, and therefore it is appropriate for this Court to vacate the decision below and remand the case to the court of appeals for reconsideration in light of *Place*.[4]

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[3]The court of appeals declined to follow the Second Circuit's decision in *Place*, 660 F.2d 44 (1981), because of its own controlling precedent in *Klein*. See Pet. App. 8-9 n.2.

[4]Because it was unnecessary to its decision, the court below did not address the question whether the agents possessed probable cause to believe that the shoulder bag contained contraband when it was seized. If there were probable cause, notwithstanding *Place*, a seizure of the shoulder bag pending the arrival of a search warrant would have been permissible. See, *e.g.*, *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979). The probable cause issue, of course, remains open on remand. In addition, it is our submission that any Fourth Amendment violation that may have occured here was at worst the product of a reasonable mistake about the applicable legal principles. If this Court recognizes a "reasonable mistake" exception to the exclusionary rule (*e.g.*, *Colorado* v. *Quintero*, cert. granted, No. 82-1711, (June 27, 1983), suppression of the evidence in this case would be inappropriate. This question as well can be considered by the court of appeals on remand.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for reconsideration in light of *United States* v. *Place*, *supra*.

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